IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO.2 OF 2001

Mr. Savio Monteiro,
Vinayak Plazza,
Above Home Town,
2nd Floor, Gogol,
Margao, Salcette, Goa..... PETITIONER

versus

1. Mr.Pascoal Barbosa
   Noronha, House No.206,
   Borda, Margao,
   Salcete, Goa;

2. M's Gripwell Club,
   603, Unitech City Centre,
   M.G. Road,
   Panaji, Goa;
   (deleted by Order
    dtd.25-10-2001);

3. Mr.Vadakel Devasia Se-
   bastian, M/s Gripwell
   Club, 928/1, Bel Layout,
   Vidyaranyapura,
   Bangalore;
   (deleted by Order
    dtd. 25-10-2001;

4. The Court of the
   Judicial Magistrate First Class,
   III Addl., Margao,Goa;

5. The Court of Sessions Judge,
   South Goa,
    Margao, ... RESPONDENTS.

Mr. A.F. Diniz, Advocate for the Petitioner.

Mr. D.G. Pangam, Mr. C.S. de Silva and Ms. Pooja Bharne, Advocates for the Respondent No.1.

CORAM : A.S. AGUIAR,J.

DATED : APRIL 11, 2002.

ORAL JUDGMENT

This Criminal Writ Petition No.2 of 2001 is directed against the Order of the Additional Sessions Judge, Margao, dated 9th January,2001 dismissing the Criminal Revision Application filed by the Petitioner/Accused No.3 against the Order dated 19-11-1999 passed by the Judicial Magistrate First Class,at Margao, in Criminal Case No.184/N/98/III Addl. dismissing the application for dropping the proceedings against him.

2. The brief facts of the case are: The Judicial Magistrate First Class, Margao ordered issue of process against the Petitioner, Respondent No.2 and Respondent No.3. The Petitioner filed an application dated 31-8-1998 before the Judicial Magistrate, First Class, contending that he is not a signatory to the cheques nor is he a Director of the Company; but he was only working as Clerk with the Accused No.1, i.e. Respondent No.2,and that in view thereof, proceedings under Section 138 of the Negotiable Instruments Act do not lie against him and the same should be dropped. The learned Magistrate, by his Order dated 19-11-1999, rejected

the application. Being aggrieved by the said Order, the Petitioner preferred Criminal Revision Application in the Court of Sessions Judge, South Goa, Margao, which came to be rejected by the impugned Order.

3. The said Order of the Additional Sessions Judge is impugned, inter alia, on the grounds that the process issued against the Petitioner without jurisdiction; that the cheque was not signed by the Petitioner but by the Respondent No.3, the Director, as authorised signatory of Respondent No.2; that merely signing of receipt by the Petitioner as authorised signatory of Respondent No.2 did not result in the Petitioner committing an offence under Section 138 of the Negotiable Instruments Act. Hence, the Petitioner has prayed for a writ quashing the impugned Order dated 19-11-1999 passed by the Judicial Magistrate, First Class, Margao and the Order dated 9-1-2001 in Criminal Revision Application passed by the Additional Sessions Judge.

4. The learned Advocate for the Petitioner draws attention of the Court to Para 3 of the complaint which reads as follows:-

" that the accused no.1 (respondent no.2) through his authorised signatory, the accused no.2 (respondent no.3), issued in favour of the complainant (respondent no.1) cheque bearing no.005242 dated 12-2-1998 drawn on the Centurion Bank Limited, Vasco-da-Gama for Rs.15,000/-; a receipt dated 31-1-1996 signed by the accused no.3 (petitioner) as the authorised signatory for the accused no.1 was also issued to the complainant when the said investment was made. "

5. It is pointed out that Section 138 of the Negotiable Instruments Act does not apply as the cheque was not drawn by the Applicant; that Section 141 of Negotiable Instruments Act which contains deeming provisions could be attracted provided it is shown that the Petitioner was in-charge of the affairs of the Company at the

relevant time, i.e.at the time when the cheque was dishonoured. In the present case, the offence can be said to have been committed on 23-3-1998, the date on which the cheque was presented and dishonoured. It is pointed out that there is no averment that on 23-3-1998, the Petitioner was in any way in-charge of the affairs of the Company. The only averment made in the complaint is that the accused no.3 i.e. the Petitioner, signed the receipt dated 31-1-1996 as the authorised signatory for the Company. Hence the Petitioner cannot be deemed to be guilty of the offence as he cannot be said to have been in-charge of the affairs of the Company at the relevant time. Reliance has been placed by the learned Advocate for the Petitioner on the case of **K.P.G. Nair v. Jindal Menthol India Ltd., reported** in 2001(5) Bom.C.R.555. The facts in the said case which are akin to the facts of the present petition are set out in Para 6 of the said Judgment. In Para 9 of the Judgment, it is held as follows:-

> ".....On the above premise, it is clear that the allegations made in the complaint do not, either in express words or with

> reference to the allegations contained therein, make out a case that at the time of commission of the offence, the appellant was in charge of and was responsible to the company for the conduct of its business."

6. An important aspect to be noted is that in the case referred to above, the accused No.3, who was one of the Directors, had signed the share certificate as well as the three cheques which were issued to the complainant for the payment of the value of the preferential shares on the date of maturity. In the present case, the Petitioner is only alleged to have signed the receipt which was issued two years prior to the date of the dishonour of the cheque on which date the offence is alleged to have been committed. In the said judgment under reference the Apex Court had held that "the High Court had misdirected itself and committed an error in coming to the conclusion that the requirements of section 141 are prima facie satisfied in so far as the appellant is concerned."

7. It is submitted by learned Advocate for the complainant that the signing of the receipt is prima facie evidence that the Petitioner was the authorised signatory of the Company and, therefore, in-charge of the affairs of the Company and, therefore, liable for the offence as made out under Section 141 of the Negotiable Instruments Act. It is his further contention that there are concurrent finding of two Courts, i.e. of the Magistrate, as well as the Sessions Court and, therefore the same should not be interfered with by this Court. And in this connection reliance has been placed on the case of **State of M.P. v. S.B. Johari and others**, reported in (2000) 2 SCC 57, Head-Note A, which is as follows:-

> "A. Criminal Procedure Code, 1973 - Ss. 27 & 228, 401 & 397 and 482 - Discharge - Court has only to see whether prima facie there was sufficient ground for proceeding against the accused - It cannot appreciate the evidence to arrive at a conclusion in the matter - On facts, held, High Court in

> revision erred in quashing the charge framed against the accused by trial Court by appreciating the material produced by the prosecution and on that basis deciding that accused was not guilty."

8. Further reliance has been also placed on the decision in the case of **Supdt. & Remembrancer of Legal Affairs, West Bengal, v. Anil Kumar Bhunja and others,** reported in AIR 1980 SC 52, wherein the Supreme Court held as follows:-

> "At the stage of framing charges, the prosecution evidence does not commence. The Magistrate has therefore, to consider the question as to framing of charge on a general consideration of the materials placed before him by the investigating Police Officer. The standard test, proof and judgment which is

> to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of S.227 or 228. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charges against the accused in respect of the commission of that offence. "

9. In the absence of averments in the complaint showing the Petitioner to be in-charge of the affairs of the Company, prima facie, the offence under Section 141 of the Negotiable Instruments Act is not attracted and the question of this Court re-appreciating the evidence or interfering with the findings of the lower Court

does not arise. In view thereof, the impugned Orders are required to be set aside.

10. Before parting, it must be stated that the joining of the Judicial Officers as Respondents to a Petition has been deprecated by the Supreme Court by its Order in **Savitri Devi v. District Judge, Gorakhpur and others,** reported in (1999) 2 SCC 577. In view thereof, the Respondents No.4 and 5 to stand deleted.

11. The Petition is allowed. The impugned Orders are set aside and the Petitioner's Application dated 31-8-1998 is allowed.

12. Petition stands disposed of.

(A.S. AGUIAR)
JUDGE.

ac.